IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 83

LEO LICHTENSTEIN, LIBBIE LICHTENSTEIN and BYRON J. LICHTENSTEIN, individually and trading as Harlich Manufacturing Company and Loomis Manufacturing Company,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now the above named petitioners and respectfully petition the Court for a rehearing hereof for the following reasons.

PETITION FOR REHEARING.

This petition is based upon the ground that the opinion in the Court below violates all of rules of statutory construction announced by this Court.

Petitioners in their brief herein in support of their petition for a writ of certiorari and in their reply brief herein relied primarily on the point that the decision in the United States Court of Appeals in the Ninth

Circuit herein is in direct conflict with this Court's holding in the case of *F. T. C.* v. *Bunte Brothers,* 312 U. S. 349.

Petitioners now as a basis for the granting of the writ of certiorari present the following grounds which is available to them and which was not presented heretofore because of petitioners' faith in the correctness of their other contention. In approaching this additional ground it seems important to make the following observations.

In the two briefs already filed herein petitioners clearly demonstrated that the case of *F. T. C.* v. *Keppel Brothers, Inc.,* 291 U. S. 304 and all cases following the *Keppel* case and also the rule of law pertaining to unfair competition, "That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition", are confined to the principle of law that "a competitor cannot use a method of competition in interstate commerce which casts upon his interstate competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt". It has also been shown that this principle of law has no application to the case at bar because the complained of acts herein do not place petitioners' competitors in a position which casts upon them the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt.

Another important fact to be considered in this discussion is that it is admitted that petitioners' said acts are not unfair to consumers, purchasers or anyone else. In fact, the sole basis upon which the said acts are held by the Court below to be unfair within the intent and

meaning of the Federal Trade Commission Act is stated by the Court as follows, to wit;

> "• • • we are of the opinion that the petitioner's use of interstate commerce to ship these devices to be used in intrastate commerce in the gambling disposition of merchandise to the ultimate consumer is one of the 'unfair • • • practices in commerce' subject to the preventive control of the Commission."

That to thus construe the Federal Trade Commission Act violates and is contrary to every principle of statutory construction announced by this Court is made self evident by the following application of the facts in the case at bar to the statutory prohibitory powers granted to the Commission by Congress. The following discussion will not only show that the construction placed upon the Federal Trade Commission Act by the Ninth Circuit Court of Appeals is a clear violation of all of the rules of statutory construction but will also establish that there is absolutely no basis upon which to predicate a holding that the petitioners' complained of acts are unfair trade practices or unfair in any manner whatsoever within the meaning and purview of the Federal Trade Commission Act.

In the beginning of our discussion it is well to set out that all of the prohibitory powers granted to the Commission are found in the following provisions of the statute:

> "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, • • • from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce".

In order to determine whether or not there is a basis for holding that the furnishing of punch boards to be used

in intrastate distribution of merchandise comes within the above provisions, it becomes necessary not only to look at the facts in the case at bar but we must in addition understand all of their ramifications. The first important aspect of the effect of these intrastate transactions is that they have absolutely no effect on interstate commerce. The Commission made no finding of fact to this effect and makes no contention that these transactions have any effect whatsoever on interstate commerce. Therefore, giving full force and effect to the dissenting opinion in the case of *F. T. C.* v. *Bunte Brothers, Inc.*, 291 U. S. 304, and by virtue of the holding in the case of *Schechter Poultry Corporation* v. *U. S.*, 295 U. S. 495, the Commission does not have power to proceed against or to issue a cease and desist order against these intrastate transactions, that is, if the Commission should after a proceeding issue an order to cease and desist against a local tavern owner restraining him from using punch boards to distribute merchandise in exclusively intrastate commerce this Court would promptly set aside said order. Therefore, this being the status of these intrastate transactions by what logic can it be said that by inference Congress intended by the provisions of the Federal Trade Commission Act to give the Commission power to stop the furnishing of only the punch board used in such transactions. This construction is certainly based upon only an inference because there is no express grant of power over the interstate shipment of punch boards. There would be, maybe, some basis for such an inference if these interstate transactions had either a detrimental effect on interstate commerce or were a violation of the Federal Trade Commission Act, but it is admitted that these transactions do not affect interstate commerce and that they are clearly not a violation of the Federal Trade Commission Act. In this regard it should be pointed out

that the Courts in the cases of *Chas. A. Brewer & Son*, v. *F. T. C.*, 158 F. 2nd 74; *Modernistic Candy, Inc.* v. *F. T. C.*, 145 F. 2d 454; *Globe Cardboard Novelty Co.* v. *F. T. C.*, 192 F. (2) 444 and the Ninth Circuit Court of Appeals in the case at bar predicated their interpretation of the statute on the erroneous principle that these intrastate transactions are within the purview of the Federal Trade Commission Act. Therefore, when it is admitted, as it must be, that these intrastate transactions are not a violation of the statute the above cases are clearly erroneous and therefore should not be followed.

From the above it is self-evident that there is no basis, reason or logic upon which to predicate an inference that Congress intended to give the Commission jurisdiction to restrain the interstate shipment of punch boards which are to be used for the distribution of merchandise, when the intrastate transactions have absolutely no effect on interstate commerce.

In addition to the fact that such interpretation of the statute is a violation of all the rules of statutory construction, such interpretation also violates many of Congress' avowed policies. This construction violates Congress's policy of not unduly interfering with the police powers of the State. In view of the tenth amendment to the Constitution, Congress advisedly adopted and maintained a policy of not interfering with strictly intrastate affairs. For this reason it seems to petitioners that the intrastate use of punch boards to distribute merchandise cannot be used as a basis for the inference that Congress intended to give the Commission jurisdiction to stop the aiding, abetting, procuring and inducing the commission of these intrastate transactions. This is especially true when it is borne in mind that many states and sub-divisions thereof have expressly legalized such use of punch boards. This interpretation of the statutes amounts to saying

that Congress has said to the States that no matter whether a State or sub-division thereof has placed its stamp of approval upon the use of punch boards to distribute merchandise Congress nevertheless characterizes such transactions as being of such a nature that they must be prohibited or that Congress will use every means within its power to stop such transactions. Congress has never intended to so characterize a strictly intrastate transaction.

This interpretation of the statute also violates Congress's avowed policy that when Congress wishes to stop the interstate shipment of any merchandise because of its detrimental intrastate effect Congress has always done so by an express and unequivocal enactment. The express provision of the Federal Trade Commission Act is that the Commission has power to restrain *"the using of any unfair method of competition or unfair or deceptive acts or practices in Commerce"*. However, the order herein is not directed at the using of any method, act or practice but is directed against the shipping of a product.

CONCLUSION.

Wherefore, petitioners respectfully request that this Court grant their petition, require by certiorari that the cause be certified to It for review of the judgment of said Circuit Court of Appeals, hear, consider, and determine the questions presented and reverse the judgment and order of said Court insofar as that judgment, and the holdings of the Court, are adverse to the petitioners' contentions.

Respectfully submitted,

F. W. JAMES,
Attorney for Petitioners.

GEORGE E. LINDELOF, JR.,
Of Counsel.

CERTIFICATE.

Comes now the undersigned, one of the attorneys for the petitioners herein and hereby certifies that this Petition is presented in good faith and is not interposed for delay and further certifies that this Petition is restricted to a ground available to the petitioner although not previously presented.

F. W. JAMES.